

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 UNITED STATES OF AMERICA            )  
  )  
4                   vs.                    )  
  )  
5 CLEVE ALEXANDER JOHNSON            )     DOCKET NO. 1:08CR233-1  
  )     Winston-Salem, North Carolina  
  )     August 18, 2009  
  )     11:26 a.m.

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8                   TRANSCRIPT OF THE **SENTENCING HEARING**  
9                   BEFORE THE HONORABLE THOMAS D. SCHROEDER  
10                  UNITED STATES DISTRICT COURT JUDGE

11 APPEARANCES:

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24       Proceedings recorded by mechanical stenotype reporter.  
25       Transcript produced by computer-aided transcription.

## P R O C E E D I N G S

(The Defendant was present.)

**MR. GALYON:** Good morning, Your Honor. The last matter for the Court is 1:08CR233-1. It is United States of America versus Cleve Alexander Johnson. He is represented by Wayne Harrison. The matter is on for imposition of sentence.

**THE COURT:** Mr. Harrison, good morning.

**MR. HARRISON:** Good morning, Your Honor.

**THE COURT:** Let the record reflect that Ms. Thompson is here as well on behalf of the probation office.

We are here today for sentencing. Before we proceed with sentencing, I recall that you had renewed your motions for Rule 29 after the verdict in this case; and I believe I asked whether you had wanted to consider filing anything, and you had indicated you had. I have not received anything.

**MR. HARRISON:** There is nothing.

**THE COURT:** I have not formally ruled on those motions. So let me do that at this time then.

The motions made after the return of the verdict are denied. They are denied for the same reasons that I expressed on the record, and I believe they are found on the December 18, 2008, transcript. According to CM/ECF, it is pages 59 through 66 where I indicated the reasons I was allowing the case to go to the jury, and I reserved ruling on the Rule 29 motion at that time; but for those same reasons, at this time I formally

1 deny the motions.

2           **MR. HARRISON:** We are in possession of the  
3 transcript, Your Honor.

4           **THE COURT:** All right. Thank you. I just wanted to  
5 make sure that was in the record and part of the record.

6           We are here today for sentencing. Have you received a  
7 copy of the presentence report?

8           **MR. HARRISON:** Yes, Your Honor, we have.

9           **THE COURT:** Have you reviewed it with your client?

10          **MR. HARRISON:** I have.

11          **THE COURT:** Are you prepared to proceed today with  
12 sentencing?

13          **MR. HARRISON:** Yes, sir.

14          **THE COURT:** Let me ask your client, Mr. Johnson, sir,  
15 have you reviewed the presentence report in your case, sir?

16          **THE DEFENDANT:** Yes, sir, I have.

17          **THE COURT:** And have you done that with the aid of  
18 your counsel?

19          **THE DEFENDANT:** Yes, sir, I have.

20          **THE COURT:** Are you satisfied that you understand the  
21 contents of your presentence report?

22          **THE DEFENDANT:** Yes, sir, I am.

23          **THE COURT:** Thank you, sir. You may have a seat. I  
24 have received and read the presentence report. I have also  
25 received a position paper by the defendant, Document 34, and a

1 position paper by the United States, Document 35.

2 Are there any other materials that have been filed that I  
3 am not aware of?

4 **MR. HARRISON:** No, Your Honor.

5 **THE COURT:** Are there any objections to the  
6 presentence report?

7 **MR. HARRISON:** As outlined in the position of the  
8 party's paper, which you referred to, it is our position that  
9 the amount of cocaine purported to be -- that my client is  
10 purported to be held liable for involved a statement made by  
11 him to an undercover agent on January 23, 2008 --

12 **THE COURT:** This is paragraph 10?

13 **MR. HARRISON:** Correct, Your Honor. It involves, I  
14 think, 226.8 grams of methamphetamine. It is our position that  
15 the source of that evidence is strictly and solely a statement  
16 of the defendant. It is not corroborated in any way by other  
17 witness observations or by observations of the alleged amount  
18 of methamphetamine.

19 It is not evidence aliunde; the content of the statement  
20 is not sufficiently supportive. It frankly doesn't exist at  
21 all. The only evidence is the evidence contained in a  
22 statement made by my client to an undercover officer, and I  
23 cite a couple of cases for the proposition that -- this is  
24 actually a general proposition --

25 **THE COURT:** Are those not, though, for the

1 proposition that a conviction cannot be had solely on an  
2 uncorroborated statement?

3           **MR. HARRISON:** They do -- they are framed in that  
4 wording. I was unable to find a case that says a sentencing  
5 factor cannot be based on evidence aliunde, cannot be based on  
6 evidence that does not have support aliunde.

7           My theory is, though, that if it's not really sufficient  
8 for a conviction, why should it be sufficient for -- to bolster  
9 a sentencing factor because it is not -- they are not talking  
10 about the conviction. The reason that we have this holding is  
11 because we are dealing with the standard of beyond a reasonable  
12 doubt. If we were dealing with preponderance, then, of course,  
13 it wouldn't matter. I don't think that appears in any case  
14 I've been able to find.

15           I think that it indicates a preference, certainly a  
16 necessity, in the area that it has been brought up for some  
17 evidence aliunde. So it should be because it is extremely  
18 undependable, and it goes deep in the English common law that a  
19 man's statement in itself is just inherently undependable. I  
20 think common sense holds that out and the framework, Your  
21 Honor, in which this particular statement was made would go, in  
22 my view, towards a finding of undependability.

23           It is in this salesmanship between two willing --  
24 allegedly willing buyers and sellers who were trying to support  
25 their bona fides: Well, you know, I don't take bad stuff, and

1 the guy says, well, I won't give you nothing but good stuff.  
2 It is all part of this puffing in a sales sort of atmosphere.  
3 It is not to be trusted any more than the typical -- well, I  
4 don't want to color with a dark paint brush all used salesmen,  
5 but that's the classic example. It is just part of the kind of  
6 interaction that is expected between people who don't know each  
7 other and are feeling each other out and are trying to  
8 establish that they want this deal, if it's going to happen --  
9 this one never did it, but if it's going to happen, then it  
10 better be okay. It better be on solid ground.

11 I think both the law and the factual basis, the atmosphere  
12 in which this statement occurred, argue for its own  
13 dependability. It certainly shouldn't be considered the  
14 preponderance of evidence sufficient to base a sentencing  
15 factor. Thank you.

16 **THE COURT:** Thank you. Mr. Galyon?

17 **MR. GALYON:** Your Honor --

18 **THE COURT:** Are you aware of any cases that address  
19 this in the context of sentencing under a preponderance  
20 standard as opposed to a conviction under beyond a reasonable  
21 doubt standard?

22 **MR. GALYON:** No, I am not, and I think perhaps the  
23 reason for that is simply because -- since it is on a  
24 preponderance standard and in looking at the relevant conduct  
25 requirements under 1.3, I think that the standard is such that

1 it sort of rarely comes up. I mean, the reality is that,  
2 typically, we are going to have a cooperating witness or  
3 someone who's talking about drug amounts and that that is sort  
4 of the more typical scenario.

5 And even if we looked at it in that context, I think it  
6 would still -- you know, this statement would certainly qualify  
7 in the context of what we are talking about here. If the  
8 statements made by Mr. Johnson were made by a CI as part of a  
9 three-party negotiation, then I think they certainly would  
10 satisfy the requirements as far as relevant conduct during the  
11 course of conspiratorial activity. I don't think there should  
12 be any difference in that than trying to say, well, this is  
13 just the uncorroborated statement of this defendant about his  
14 involvement in a prior drug deal because the reality is, of  
15 course, it is not viewed separate and apart from what's going  
16 on in total.

17 All of his statements, whether it is in the buyer/seller  
18 context, whether it is in the puffing context, whatever -- you  
19 know, the reality is that all the stuff that he talked about  
20 during the course of that January 23rd meeting were entirely  
21 consistent with what we know to be the truth; that is, his  
22 statements about having previously gotten in trouble, his  
23 involvement in trafficking in marijuana that was the subject of  
24 his prior federal conviction, the fact that he had had money  
25 seized by feds. He didn't say they have taken \$100,000 from me

1 and that be a lie. He was absolutely correct. He knew exactly  
2 how much money had been taken from him. There was the 16,000  
3 that was part of the prior deal, and then there was an  
4 additional 15,000 that was taken, or some amount that was  
5 taken, as part of a previous seizure about ten or twelve months  
6 before. So he knew exactly how much money had been taken, that  
7 that was part of his issue with why he wanted to get a good  
8 supplier.

9 One of the things that I didn't point out in the position  
10 paper perhaps as strenuously as now seems important is he had  
11 methamphetamine with him. So if you want to talk about  
12 evidence aliunde -- that is, evidence that he had gotten  
13 methamphetamine from someone on a prior occasion -- the fact  
14 that he has meth with him, he shows it to the undercover to say  
15 is your stuff as good as this, not only goes a long way in the  
16 context of this man is involved in the distribution of  
17 methamphetamine, but also that he had some methamphetamine from  
18 someone else because, as we know, he had \$16,000 for the deal  
19 in December that got seized, and he even references that in the  
20 January 23rd meeting, saying, I had that money -- I guess I was  
21 going to give that to you. I was going to get a pound of meth  
22 from you, referring to the undercover, thinking that was the  
23 supplier, and then he talks about how in great detail -- you  
24 know, he just didn't say, I got some meth a while ago, but it  
25 wasn't as good as I wanted it; he says, I got meth. I picked



1 up a half pound the other day. I had about five ounces out of  
2 eight ounces was good and the other three I had to take it  
3 back. That's what I hate, you know, having to take it back.  
4 He wants a good supplier.

5 So just coming up with that -- if we were going to argue  
6 that that's a lie, I mean, that's a pretty sophisticated lie in  
7 the context of this conversation. That in context -- the  
8 specificity of those statements, I would argue, go to the fact  
9 that it is evidence of recently remembered activity consistent  
10 with the fact that he has a quantity of meth on him to show to  
11 the undercover to say I want to make sure that your  
12 methamphetamine is as good as this methamphetamine.

13 **THE COURT:** So you are saying that that's consistent  
14 with a finding that the meth he was showing to the undercover  
15 agent was the good part of the half pound he got?

16 **MR. GALYON:** Certainly. And, again, if -- at the  
17 very least, it shows that he was procuring methamphetamine  
18 during the course of the conspiracy in addition to the meth  
19 that he was trying to get from the undercover and that he had  
20 tried to get in December as part of this, that he was able to  
21 get methamphetamine. And consistent with that, I would argue,  
22 that, yes, because he says -- he gives a timeframe, too. He  
23 didn't say a year ago I got meth and, you know, a lot of it was  
24 bad, and that's why I have been trying to find a good source.  
25 He says, the other day, the other day I picked up a half pound.

1       And so, yes, I think that goes to the idea that this small  
2 sample is certainly a portion of that; and even if it isn't, it  
3 goes to the fact that very recently, during that timeframe in  
4 January, he had procured methamphetamine.

5       So I think that those -- the statements that he made not  
6 only are corroborated by -- internally corroborated by the  
7 circumstances under which they are made, but they are also  
8 corroborated by the fact that he has methamphetamine in his  
9 possession. All of that, I would argue, strongly support the  
10 statement itself and the fact that he should be held  
11 accountable for that relevant conduct.

12       I think the other part of that argument has already been  
13 laid out related to the cases and, of course, Mr. Harrison has  
14 already described the fact that those are made in the context  
15 of the typical confession to law enforcement post-Miranda as  
16 opposed to this situation where they are made as part of a  
17 negotiation, not as part of a statement to law enforcement. He  
18 didn't know the undercover was a law enforcement officer. He  
19 thought he was talking with a potential supplier for  
20 methamphetamine.

21       I would argue in that context that he is providing  
22 information, and that that information, as far as the previous  
23 amounts, is consistent with his involvement in methamphetamine  
24 trafficking and his willingness to engage in the  
25 methamphetamine trafficking.

1           **THE COURT:** Thank you. Anything further?

2           **MR. HARRISON:** Just one brief observation, Your  
3 Honor. Another factor here is that we are certainly not given  
4 any showing that this -- even if he acquired other  
5 methamphetamine, whether or not it was in connection with the  
6 conspiracy charge. In fact, he makes some statements to this  
7 undercover guy, saying these people aren't going to be  
8 involved.

9           There is no showing that it is in -- that it is activity  
10 that is connected with the conspiracy count of conviction. No  
11 showing, in fact, that it is a conspiracy. It could be him  
12 just acting alone, and that in itself, it would seem to me,  
13 would take it out of the relevant conduct issue.

14           **THE COURT:** Mr. Galyon, do you want to respond to  
15 that argument?

16           **MR. GALYON:** Well, Your Honor, you've -- you will  
17 recall that from the trial itself, not only did we have the  
18 evidence from the beginning of the timeframe of the conspiracy  
19 from Robby Todd and Lori Wilson related to their accompanying  
20 Melvin Johnson to this defendant's residence or a dwelling to  
21 get methamphetamine, that Melvin Johnson was getting  
22 methamphetamine from this defendant, and that there, of course,  
23 were numerous conversations during the course of the timeframe  
24 related to trying to get the pound of methamphetamine.

25           After that money was seized, there was continued

1 negotiation. You will recall there was in January a  
2 circumstance where, again, Lori Wilson and Robby Todd went with  
3 Melvin Johnson to see Mr. Johnson, this defendant, down in High  
4 Point; and on that occasion, they discussed phone numbers in  
5 order to have sort of a direct link with Robby Todd.

6 But even during the course of this January conversation,  
7 there is discussion about -- where this defendant talks about,  
8 Do you know my cousin Melvin Johnson? Much was made of that  
9 during the course of the trial, but the reality is that he  
10 asked about that. The introduction was made through Robby  
11 Todd, but he actually asks the undercover if the undercover  
12 knows Melvin Johnson, his cousin.

13 And, again, I think that's all sort of part and parcel of  
14 the fact that this is part of a conspiracy involving those two  
15 individuals; and while this defendant may, as part of that  
16 conspiracy, get methamphetamine from additional sources, that  
17 doesn't change the fact that those individuals were involved in  
18 a conspiracy, and the conspiracy was to distribute  
19 methamphetamine. I mean, that's why he is getting these  
20 quantities of methamphetamine.

21 **THE COURT:** Do I have to find that the amount of the  
22 half pound was actually part of the conspiracy in order to  
23 attribute that amount for sentencing purposes here? Do I have  
24 to find that under 1B1.3?

25 **MR. GALYON:** Well, under 1B1.3, it talks about all

1 acts and omissions caused by the defendant as part of this  
2 offense. So I think it has to be --

3 **THE COURT:** It says at the bottom, "that occurred  
4 during the commission of the offense" -- I'm reading from the  
5 bottom of 1B1.3 -- "of conviction, in preparation for that  
6 offense, or in the course of attempting to avoid detection or  
7 responsibility for that offense."

8 **MR. GALYON:** Right.

9 **THE COURT:** So you believe that -- I am just getting  
10 your view on this. Do you believe that the half pound has to  
11 be within the ambit of the conspiracy in some fashion in order  
12 to have it attributed to Mr. Johnson?

13 **MR. GALYON:** Well, I do only because as Part B  
14 there -- under (a)(1)(B), "in the case of a jointly undertaken  
15 activity" --

16 **THE COURT:** Uh-huh.

17 **MR. GALYON:** -- it talks about reasonably foreseeable  
18 acts in furtherance of the jointly undertaken activity. I  
19 think that -- in my estimation, that sort of informs on it as  
20 well, that it has to in some way be related. That's why it is  
21 considered to be this relevant conduct, and I would argue that  
22 it is; that just because he doesn't say Melvin and I got the  
23 eight ounces or anything like that, that doesn't change the  
24 fact that it is during the timeframe of the conspiracy and is a  
25 reasonably foreseeable act.

1        Even if he didn't say to -- even if this defendant didn't  
2 say to Melvin Johnson, I am going to go get eight ounces,  
3 that's a reasonably foreseeable act during the course of the  
4 conspiracy because there is no evidence that they quit being  
5 partners. There is no evidence of that.

6        The fact that he goes with Robby Todd to meet the  
7 source -- the source that he met or was intending to meet in  
8 December through Robby Todd, that's the same individual that he  
9 met -- that he was introduced to through his association with  
10 his co-conspirator Melvin Johnson because, as the Court  
11 recalls, Melvin Johnson was the link essentially to Robby Todd.

12        There was a discussion about how they were initially going  
13 to -- Robby Todd, as the cooperator, was initially going to  
14 provide precursor materials essentially. This defendant was  
15 going to help pay for the precursor materials, and that Melvin  
16 Johnson was essentially the go-between and that he owed money,  
17 that he had been working to sell methamphetamine for Cleve  
18 Johnson -- all of that.

19        So nothing changed during the course of all that. He was  
20 still -- this defendant and Melvin Johnson were still involved  
21 in the drug business together, but Melvin Johnson wasn't -- he  
22 wasn't the main person, and so this defendant was trying to  
23 procure additional methamphetamine during the course of that  
24 conspiracy; but whether or not he said, Melvin, I am going to  
25 go out and get more meth so you can sell it doesn't change the

1 fact that they were still in a conspiracy and that the  
2 defendant -- by getting those additional eight ounces, that  
3 would have been during the course of the conspiracy and would  
4 have been related to it.

5 So that's a long way of getting around to saying that I do  
6 think that it was related or would need to be related to the  
7 conspiracy; but that being able to establish that under the  
8 relevant conduct standard, given the conspiracy charge, is not  
9 a difficult hurdle.

10 **THE COURT:** All right. Thank you. Anything further,  
11 Mr. Harrison?

12 **MR. HARRISON:** Your Honor, I mean, to stand up and  
13 recite what the Government has already alleged and, to a jury's  
14 satisfaction, proven and then includes any purchase of  
15 methamphetamine ever is just -- runs right in the face of the  
16 requirement in the sentencing guidelines that the activity be  
17 connected with the charged conspiracy, and there is  
18 absolutely -- Mr. Galyon has talked about a lot of evidence  
19 that he introduced during the trial, none of which includes any  
20 explanation for the purpose of buying the alleged half pound  
21 that he said he bought. He didn't say he bought it for a  
22 particular person. He didn't say -- and the fact that there is  
23 no evidence of that cannot be evidence of it.

24 That's essentially what the Government is doing is saying,  
25 well, we proved this conspiracy, and Melvin was one of the

1 members and Cleve Johnson was one of the members. Therefore,  
2 if Cleve Johnson -- if you believe Cleve Johnson bought any  
3 methamphetamine, he bought it for purposes of advancing the  
4 charged conspiracy of which there is no evidence. You just say  
5 it; that every time you buy anything, it is for that charged  
6 conspiracy.

7 Why have the requirement in the language of the guidelines  
8 that an establishment of a relationship be shown? There is no  
9 such showing. Thank you.

10 **THE COURT:** Give me just a minute. (Reading.)

11 Mr. Galyon, tell me again how do you tie the half pound in  
12 with the purpose of the conspiracy? How is it either  
13 reasonably -- how is it reasonably foreseeable and in  
14 furtherance of the conspiracy based on the evidence in the  
15 case?

16 **MR. GALYON:** Well, that's -- perhaps I made it a  
17 little bit more difficult than it needs to be.

18 It would be -- the issue on joint undertaken activity is  
19 if this eight ounces is being used against Melvin, which it  
20 wasn't, you know -- and perhaps because at that time there  
21 wasn't a fine-toothed comb going through the statements of this  
22 defendant and the video and that sort of thing.

23 We didn't have the benefit of the transcript at that  
24 point, but that's where the reasonably foreseeable would come  
25 in as to whether or not it would get attributed to the



1 co-defendant because the co-defendant wasn't present when that  
2 happened.

3       So it is more akin, actually, I guess to the (A) because  
4 we are talking about the act of that defendant during the  
5 course of the conspiracy because that's -- he is the one that  
6 said, I went out and got eight ounces. He didn't say somebody  
7 else did it, you know, and then now I am getting blamed for it  
8 essentially. He is the one that made that statement.

9       So the fact that that eight ounces is procured during the  
10 timeframe of the conspiracy I think actually gets us back to, I  
11 guess, the point that the Court asked about initially and, that  
12 is, you know, what essentially do you have to show as the tie;  
13 and the reality is the tie is, I would argue, the drug itself.

14       I mean, we are talking about the fact that a conspiracy  
15 has been established and just as if the jury had been asked to  
16 determine whether -- exactly which amounts -- beyond just a  
17 threshold amount but exactly how much he would have been  
18 responsible for during the course of what was involved in the  
19 conspiracy.

20       You know, the reality is once we establish that there was  
21 a conspiracy, then I think the relevant conduct question is a  
22 much easier question to answer because --

23               **THE COURT:** Conspiracy and at the threshold drug  
24 quantity level?

25               **MR. GALYON:** Right. I mean, because the first

1 question that would have been answered by the jury, of course,  
2 was the question of whether or not there was a conspiracy, and  
3 that question has already been answered; and then the question  
4 was, in order for statutory purposes, was there at least  
5 50 grams involved and, of course, they answered yes.

6 But beyond -- regardless of the statutory issue the jury  
7 had to decide, the issue of -- once you establish the  
8 conspiracy itself, then arguably all these other actions that  
9 the defendant takes during the course of the conspiracy are  
10 going to be attributable to him to the extent that they are  
11 relevant.

12 You know, we are not talking about -- when Mr. Harrison  
13 talks about basically any other drug deal that he was involved  
14 in during that time or any other drug deal would be in -- would  
15 be attributed to him, well, during that timeframe of the  
16 conspiracy and involving methamphetamine, it certainly could be  
17 because we don't have evidence to the contrary.

18 I mean, he was involved in a conspiracy to distribute  
19 methamphetamine. He admits during the course of that timeframe  
20 of the conspiracy that he had gotten additional methamphetamine  
21 consistent with a distribution amount. We are not talking  
22 about I got, you know, three grams. He says, I got a half  
23 pound, which is eight ounces, and that he had to take some of  
24 it back because it wasn't good quality.

25 Again, that goes to the idea -- I mean, he was there to

1 get a half pound again. That was the whole point. We are not  
2 talking about personal amounts, personal use amounts. We are  
3 talking about amounts for distribution, which is the object of  
4 the conspiracy.

5 So I would argue that, yes, during that timeframe, the  
6 timeframe alleged in the indictment and with the person that he  
7 met through Melvin Johnson, that it certainly stands to reason  
8 that when he says I got methamphetamine the other day, that  
9 that methamphetamine is going to be attributable to him as part  
10 of that same conspiracy whether or not he says specifically I  
11 was going to give some of it to Melvin to distribute --

12 **THE COURT:** So your argument is this would be a  
13 different issue if it were Melvin Johnson's sentencing?

14 **MR. GALYON:** Right. Then we would look under (B).  
15 The reason I pointed out (B) is just because it talks about  
16 what's part of the conspiracy and that you have that sort of  
17 additional requirement if you weren't the one who did it, but  
18 here Mr. Cleve Johnson admits I was the one that got -- you  
19 know, I got a half pound the other day. I had to take three  
20 ounces of it back because it wasn't any good.

21 So when it says "all acts and omissions committed" by the  
22 defendant are going to be attributable to him, I think that the  
23 guideline means what it says.

24 **THE COURT:** All right. Thank you. There is an  
25 objection before the Court as to the drug quantity of half a

1 pound that's been attributed to the defendant, Cleve Johnson,  
2 as referenced in paragraph 10 of the presentence report.

3 The Court finds by a preponderance of the evidence that  
4 Mr. Johnson's statements that he had recently purchased or  
5 gotten one-half pound of methamphetamine are credible, and the  
6 Court finds that Cleve Johnson, in fact, said that he had  
7 recently gotten a half pound of methamphetamine and had to take  
8 some back -- several ounces back because they were poor  
9 quality.

10 So the Court makes that finding by a preponderance of the  
11 evidence and finds that the amount of 226.8 grams is the amount  
12 that Mr. Johnson stated in the commission of the offenses in  
13 question that he had earlier purchased and that those amounts  
14 should be attributable to the defendant, and the Court finds  
15 that those are appropriately attributable under U.S. Sentencing  
16 Guideline 1B1.3 and the commentary and application notes that  
17 follow from that.

18 The defendant is accountable for all the quantities of  
19 contraband with which he was directly involved. So the  
20 objection is overruled.

21 Now, are there any other findings with respect to that  
22 that either party believes I need to make for the record?

23 **MR. GALYON:** No, Your Honor.

24 **THE COURT:** All right. Any other objections,  
25 Mr. Harrison, to the presentence report?

1           **MR. HARRISON:** No, Your Honor.

2           **THE COURT:** All right. I should say as well that  
3 there were other indicia of reliability that persuaded me that  
4 Mr. Johnson's statements should be credited, and that is that  
5 he does reference a specific amount and he references that it  
6 was recently purchased.

7           I understand the argument of the defendant that the  
8 defendant may have been puffing his drug trafficking  
9 credentials. That goes to the credibility of the statement. I  
10 will find that it is credible.

11          Okay. The Court has one other typographical error that  
12 appears in the presentence report. I want to bring your  
13 attention to page 7, paragraph 19, under base offense level.  
14 It indicates a base offense level of 32, which I believe is  
15 correct; but the paragraph describing that that's provided in  
16 paragraph 19 concludes that the base offense level is 30. I  
17 believe that should be 32.

18          That's paragraph 19, Mr. Harrison.

19           **MR. HARRISON:** Yes, I see that and agree that that  
20 must be typographical.

21           **THE COURT:** Mr. Galyon, are you in agreement with  
22 that?

23           **MR. GALYON:** Yes, sir.

24           **THE COURT:** So paragraph 19 will be amended to  
25 reflect that the base offense level is 32, and I'm referring to

1 the last clause of the second sentence of that paragraph. It  
2 presently reads that the base offense level is 30, and it cites  
3 to Sentencing Guideline 2D1.1(a)(3) and (c)(4), and it should  
4 read the base offense level is 32, which is, in fact, what was  
5 indicated to the right of where the calculations are being  
6 made.

7 All right. The Court adopts the presentence report with  
8 that one change. As to all matters in the presentence report  
9 then, the Court adopts as findings of fact.

10 We are here today to consider the imposition of a  
11 sentence. The defendant was convicted by a jury of Counts One  
12 and Two of the indictment: Count One charging conspiracy to  
13 distribute methamphetamine in violation of Title 21 of the U.S.  
14 Code, Sections 846 and 841 (b)(1)(B); and Count Two charging  
15 attempt to possess with intent to distribute methamphetamine in  
16 violation of Title 21 of the U.S. Code, Sections 846 and  
17 841(a)(1) and (b)(1)(B).

18 Taking the guidelines into account then on an advisory  
19 basis, it appears that the following calculations result:  
20 Total offense level is 32; criminal history category is 5; the  
21 guideline range of imprisonment is 188 to 235 months. There is  
22 a statutory minimum of ten years and a maximum of life on each  
23 of Counts One and Two. The guideline supervised release range  
24 available upon revocation is 8 years on each count. The fine  
25 range is \$17,500 to \$8 million, but restitution on Count One is

1 there is none; as to Count Two, there is community restitution  
2 of not more than \$4 million.

3 Do the parties agree that these are the guideline ranges  
4 in the case?

5 **MR. HARRISON:** I do, Your Honor.

6 **MR. GALYON:** Yes, Your Honor.

7 **THE COURT:** The Court has considered the calculations  
8 resulting from an application of the guidelines. The Court  
9 finds that they have been appropriately determined.

10 In addition to considering the guidelines on an advisory  
11 basis and considering the factors under Title 18 of the U.S.  
12 Code, Section 3553(a), I'll hear from you now, starting with  
13 Mr. Harrison, as to any factor you would like to present to  
14 assist me in determining a reasonable and appropriate sentence  
15 in this case.

16 **MR. HARRISON:** Well, sir, the first thing that  
17 strikes me, of course, is the fact that even at the bottom end  
18 of the guidelines here we are dealing with a man considerably  
19 advanced in age relative to the sentence that he is facing. It  
20 is the functional equivalent of a life sentence. It is to be  
21 imposed within the framework of conduct that never really got  
22 off the ground. The amounts involved are attempts and  
23 conspiracies that never came to bear fruit.

24 I'm not trying to excuse that totally by the fact that  
25 nothing ever really happened, but the law recognizes that kind

1 of thing. If I take a shot at somebody sitting in that chair  
2 over there and miss, then my punishment -- even though I wanted  
3 to shoot him right between the eyes, my punishment is  
4 considerably less than if I had been -- if my aim had been up  
5 to my equipment. There is an enormous difference in assault  
6 with a deadly weapon and murder, and that only is true because  
7 of what actually happened.

8 I think there is an element of that to be taken into  
9 consideration under 3553 in this or any other case wherein you  
10 have attempts essentially -- a fundamental attempt rather than  
11 a successful completion.

12 I remember the first thing that my criminal law professor  
13 back in Chapel Hill, so many decades ago that it begins to  
14 become depressing, told me and that is that you've got to both  
15 have the evil in your mind and you've got to have the evil  
16 result; and that here has its effect, or should in my opinion,  
17 on reducing the depth of the wound that is extracted from my  
18 client. One-hundred-eighty-eight months is a long time. Thank  
19 you.

20 **THE COURT:** All right. Mr. Galyon? Before I get to  
21 you, are you arguing for a low guideline --

22 **MR. HARRISON:** Yes, sir.

23 **THE COURT:** -- range?

24 **MR. HARRISON:** Yes, sir. I think 188 months is  
25 sufficient and that more would be excessive.



1           **MR. GALYON:** Just a couple of things. One, in  
2 looking at the presentence report, Ms. Thompson has pointed out  
3 on page 39, Part E, about factors that may warrant departure,  
4 that this defendant's but for timeframe would have been a  
5 career offender. He had a crime of violence or what would have  
6 qualified as a crime of violence, but because of operation of  
7 the guidelines that was not counted; and so as a result, he is  
8 not a career offender, but that is one of the things that the  
9 Court can look at in consideration of an appropriate sentence.

10           Even more than the potential career offender issue is  
11 looking at how Mr. Johnson has done following his conviction  
12 for marijuana trafficking in federal court in New Mexico. I  
13 think that is as telling as any part of the presentence report,  
14 what's involved in that beyond the offense itself, what  
15 happened subsequent to his conviction and the time he spent in  
16 prison. There were several modifications of his supervised  
17 release. There was a revocation of his supervised release.

18           All of those things I think go to the fact that  
19 Mr. Johnson -- despite what the Court sees related to a trust  
20 account and the fact that his family had provided for him, that  
21 he had continued to engage in this criminal activity. I mean,  
22 he's a Criminal History Category V, and that's without a vast  
23 number of these misdemeanor and felony convictions counting  
24 because they are older.

25           So the reality is that you've got an individual who, even

1 with their most recent criminal activity, has a felony in  
2 federal court, that that was apparently insufficient to deter  
3 him from continuing to engage in criminal activity; and I think  
4 that, as much as anything, is an appropriate reason for  
5 sentencing at the high end of the guideline range consistent  
6 with probation's recommendation, and that would be the  
7 Government's request. Thank you.

8           **THE COURT:** All right. Mr. Johnson, is there  
9 anything you would like to say in your own behalf before I  
10 render a decision? I will advise you that you have no  
11 obligation to speak, but I will be happy to hear from you now,  
12 sir, if you wish to address the Court.

13           **THE DEFENDANT:** Your Honor, I would just to like  
14 apologize to the Court for any inconvenience to him. My wife  
15 and my aunt are sitting back there behind me. That's the only  
16 two people I have in my family left. My mother and brother is  
17 deceased. I had a brother get killed in a car wreck. I  
18 just -- I got a 7-year-old daughter, that she just don't  
19 understand what is going on. I just ask for mercy. That's all  
20 I have to say.

21           **THE COURT:** All right. Thank you, sir.  
22 Ms. Thompson, can you approach the bench, please.

23           (Off-the-record discussion between the Court and the  
24 Probation Officer.)

25           **THE COURT:** All right. The Court has taken the

1 guidelines into account on an advisory basis. The Court notes  
2 that the total offense level is 32, the criminal history  
3 category is 5, and the guideline imprisonment range is 188 to  
4 235 months.

5 The Court has taken into account the arguments of counsel,  
6 their position papers, and the statements of the defendant.

7 The Court has also taken into account all of the 3553(a)  
8 factors in determining an appropriate sentence in this case.  
9 The sentence the Court will impose will be that which will be  
10 sufficient but not greater than necessary to meet the  
11 sentencing objectives of Section 3553(a) and any sentencing  
12 objectives that may apply as well under the advisory  
13 guidelines.

14 The Court finds that the sentence that it will impose is  
15 200 months and that such a sentence is reasonable. The Court  
16 notes that the sentence is within the guideline range.

17 This sentence is imposed because the Court feels that the  
18 nature and circumstances of the offense and history of this  
19 defendant require and justify such a sentence. This sentence  
20 involves large quantities of methamphetamine -- I'm sorry, this  
21 offense, rather, involves large quantities of methamphetamine.

22 I've also, though, been persuaded by the need for the  
23 sentence to promote respect for the law and to afford adequate  
24 deterrence to criminal conduct. The defendant has one prior  
25 drug charge, paragraph 49 of the presentence report. The

1 defendant was convicted in federal court and sentenced to 24  
2 months imprisonment and 2 years of supervised release. The  
3 defendant violated his supervised release not once but twice,  
4 testing positive for methamphetamine and for marijuana use and  
5 for cocaine. The defendant also has a substantial criminal  
6 history, including multiple breaking and enterings and felony  
7 burning of a building.

8 The Court notes that the defendant could have been  
9 subjected to an upward departure in this case based on his  
10 extensive criminal history for which no points were given to  
11 him in this case.

12 So having considered the advisory guidelines and the  
13 factors under Title 18 of the U.S. Code, Section 3553(a), the  
14 Court finds that a sentence of 200 months is reasonable under  
15 the facts of this case and is appropriate.

16 It is, therefore, ordered that the defendant be committed  
17 to the custody of the United States Bureau of Prisons for a  
18 term of 200 months on each of Count One and Count Two to run  
19 concurrently followed by 8 years of supervised release to run  
20 concurrently.

21 The defendant is ordered to pay a special assessment of  
22 \$100 on each of Count One and Count Two. That will be due and  
23 payable immediately. To the extent he cannot immediately  
24 comply, the Court will recommend that he participate in the  
25 Inmate Financial Responsibility Program.

1 Bear with me. In addition to the usual terms of  
2 supervised release, it is ordered that the defendant shall  
3 provide any requested financial information to the probation  
4 officer. The defendant shall not incur new credit charges or  
5 open additional lines of credit without the approval of the  
6 probation office.

7 The defendant shall submit to substance abuse testing at  
8 any time as directed by the probation officer, and the  
9 defendant shall cooperatively participate in a substance abuse  
10 treatment program, which may include drug testing and inpatient  
11 and residential treatment, and to pay for treatment services as  
12 directed by the probation officer. During the course of  
13 treatment, the defendant shall abstain from the use of  
14 alcoholic beverages.

15 The defendant shall notify the probation officer of any  
16 material changes in economic circumstances that may affect his  
17 ability to pay restitution, a fine, and special assessment.

18 Let me ask Ms. Thompson to approach the bench one more  
19 time, please.

20 (Off-the-record discussion between the Court and the  
21 Probation Officer.)

22 **THE COURT:** The defendant will be ordered to pay a  
23 fine in the amount of \$10,000. In the event the entire amount  
24 of this penalty is not paid prior to the commencement of the  
25 term of supervised release, the defendant shall make payments

1 in equal monthly installments of \$100 to begin 60 days after  
2 the commencement of the term of supervised release and  
3 continuing during the entire term of supervised release or  
4 until paid in full.

5 Let me hear from the parties as to denial of federal  
6 benefits under Title 21, Section 862. Do you wish to be heard  
7 on that?

8 **MR. GALYON:** No, Your Honor.

9 **MR. HARRISON:** No.

10 **THE COURT:** All right. The instant offense is the  
11 defendant's second conviction for an offense involving  
12 distribution of a controlled substance. Pursuant to Title 21  
13 of the U.S. Code, Section 862, the defendant is declared  
14 ineligible for any and all federal benefits for a period of ten  
15 years, as those benefits are defined under statute.

16 The Court will recommend that the defendant be designated  
17 to a facility where he may participate in an intensive  
18 substance abuse treatment program.

19 Any other requests with respect to BOP?

20 **MR. HARRISON:** In view of the fact that he has a  
21 minor child and family here, I would ask that he be housed --  
22 or recommended by the Court to be housed in a facility as near  
23 as possible to High Point, North Carolina.

24 **THE COURT:** The Court will recommend that the  
25 defendant be designated to a facility as near as possible to

1 his residence in High Point, North Carolina.

2 Do you understand, Mr. Johnson, that's a recommendation?

3 It is up to the Bureau of Prisons as to how they comply with  
4 that based on their load at the time and needs that they have.

5 Any other things from the defendant?

6 **MR. HARRISON:** No, Your Honor.

7 **THE COURT:** Mr. Galyon, anything further from the  
8 Government?

9 **MR. GALYON:** No, Your Honor.

10 **THE COURT:** Do we need a -- was anything seized as a  
11 result of this? Is there any need for a destruction order?

12 **MR. GALYON:** No, Your Honor. Some cell phones and  
13 personal items, that sort of thing. We can -- we would request  
14 at the end of the appellate period that they be returned unless  
15 they are of a non-evidentiary value and a return pursuant to  
16 DEA policy.

17 **THE COURT:** It will be so ordered.

18 Have you advised your rights about any rights of appeal  
19 that he may have?

20 **MR. HARRISON:** Yes, Your Honor. And I have signed,  
21 and so has he, a notice concerning right to appeal that was  
22 supplied to me by the court official.

23 **THE COURT:** All right. Please make sure that  
24 Mr. Johnson is aware that, if he chooses to file notice of  
25 appeal, he must do so in writing within ten days of the entry

1 of the Court's judgment.

2 **MR. HARRISON:** Yes, sir.

3 **THE COURT:** Mr. Johnson, you are looking at a  
4 substantial period of time. I am very aware of that. I tell  
5 everybody that you have choices when you are in prison. I  
6 think for you it looks like getting some drug treatment is  
7 going to be an important step for you in being able to get on  
8 the right path, but you are going to have choices in prison.

9 It looks like the last time you went to federal prison you  
10 continued to engage in your same conduct, and it got you here  
11 today. I encourage you to do all you can within your power to  
12 make the right choices and to be careful of some of the  
13 associations you may have in prison. There are not necessarily  
14 all good opportunities there.

15 You have a substantial sentence, but you are still at the  
16 point where you will be given potential credit and be able to  
17 be released and still have a productive life afterwards to  
18 spend some time with your child.

19 So I wish you good luck in the process. I encourage you  
20 to focus yourself on the right decisions you need to make  
21 because all of this is a consequence that you choose to make in  
22 your life and how they affect other people.

23 And when you are released this time, since you had trouble  
24 with it in the past, please be aware that if you violate your  
25 supervised release and get involved in drugs or other criminal



1 activity that your supervision can be revoked and you can be  
2 sent back to prison. In your case that is a substantial period  
3 of supervised release, and that can be a substantial prison  
4 sentence.

5 **THE DEFENDANT:** I understand that.

6 **THE COURT:** Anything further from the Government?

7 **MR. GALYON:** No, Your Honor.

8 **THE COURT:** We'll be in recess until 2:00.

9 (END OF PROCEEDINGS AT 12:32 P.M.)

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1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER  
4  
5

6 I, Briana L. Nesbit, Official Court Reporter,  
7 certify that the foregoing transcript is a true and correct  
8 transcript from the record of the proceedings in the  
9 above-entitled matter.

10  
11 Dated this 4th day of November 2009.  
12  
13

14 //S//Briana L. Nesbit  
15 Briana L. Nesbit, RPR  
16 Official Court Reporter  
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